

EXHIBIT L

FILED

DEC 21 2007

SECRETARY, BOARD OF
OIL, GAS & MINING

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

**SOUTHERN UTAH WILDERNESS
ALLIANCE,**

Petitioner,

vs.

DIVISION OF OIL, GAS & MINING,

Respondent,

and

UTAH AMERICAN ENERGY, INC.

Respondent-Intervenor.

**ORDER ON SOUTHERN UTAH
WILDERNESS ALLIANCE'S MOTION
FOR STAY OF MINING ACTIVITIES**

**Docket No. 2007-015
Cause No. C/007/013-LCE07**

Petitioner Southern Utah Wilderness Alliance's Motion for Stay of Mining Activities in this Cause came on regularly for hearing before the Board of Oil, Gas and Mining (the "Board") on October 24, 2007, at 10:00 a.m. in the Hearing Room of the Utah Department of Natural Resources at 1594 West North Temple Street, in Salt Lake City, Utah.

The following Board members were present and participated in the hearing: Acting Chairman Robert J. Bayer; Samuel C. Quigley; Jean Semborski and Ruland J. Gill, Jr.

Stephen H.M. Bloch and Kathy Weinberg appeared as counsel for Petitioner Southern Utah Wilderness Alliance ("SUWA"). Steven F. Alder and James P. Allen, Assistant Attorneys General, appeared on behalf of Respondent Division of Oil, Gas and Mining (the "Division"). Denise Dragoo and John E. Jevicky appeared as counsel for Respondent-Intervenor

UtahAmerican Energy, Inc. ("UEI"). Michael S. Johnson and Stephen Schwendiman, Assistant Attorneys General, represented the Board.

The Board heard oral argument on SUWA's Motion for Stay of Mining Activities addressed by the parties in the following briefs:

- SUWA's Motion for Stay of Mining Activities ("SUWA's Motion");
- SUWA's Memorandum in Support of Motion for Stay of Mining Activities ("SUWA's Lead Brief");
- Division's Response to Southern Utah Wilderness Alliance's Motion for Stay of Mining Activities ("Division's Brief");
- UEI's Memorandum in Opposition to Southern Utah Wilderness Alliance's Motion and Memorandum for Stay of Mining Activities ("UEI's Brief");
- SUWA's Reply in Support of Motion for Stay of Mining Activities ("SUWA's Reply Brief");

NOW THEREFORE, the Board, having considered the above-listed briefs and the oral arguments made, the exhibits introduced and the testimony given at the hearing, and good cause appearing, hereby rules as follows:

I. STANDARD FOR TEMPORARY RELIEF UNDER THE COAL ACT

SUWA moves this Board pursuant to both Utah Administrative Code R645-300-212.200-240 and Rule 65A of the Utah Rules of Civil Procedure to stay all mining activities in connection with the proposed Lila Canyon Mine which is the subject of this Cause. The requested stay encompasses construction activities associated with the Coal Haul Road leading to the mine, as well as construction of surface facilities at the mine site. SUWA's Motion at 2; SUWA's Lead

Brief at 2.

The parties disagree as to which standard for the granting of injunctive relief governs. As noted above, SUWA cites two provisions, each setting forth a slightly different standard. SUWA cites the coal rules, which provide:

212.200. The Board may, under such conditions as it prescribes, grant such temporary relief as it deems appropriate, pending final determination of the proceeding, if:

212.210. All parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

212.220. The person requesting that relief shows that there is a substantial likelihood that he or she will prevail on the merits of the final determination of the proceeding;

212.230. The relief sought will not adversely affect the public health or safety, or cause significant, imminent environmental harm to land, air, or water resources . . .

Utah Administrative Code R645-300-212.200-230 (2007). This standard is drawn from Section 40-10-14(4) of the Coal Mining and Reclamation Act (the "Coal Act")¹, which itself mirrors the standard set forth in the federal Surface Mining Control and Reclamation Act ("SMCRA") for state programs, *see* 30 U.S.C.A. §1276(c) (2000). SUWA also cites Rule 65A of the Utah Rules of Civil Procedure, which provides for injunctive relief where:

(e)(1) The applicant will suffer irreparable harm unless the order or injunction issues;

(e)(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

(e)(3) The order or injunction, if issued, would not be adverse to the public interest; and

(e)(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

Utah R. Civ. P. 65A(e). The Division argues that because the Coal Act and coal rules set forth a specific legal standard for temporary relief, it is improper to employ the differing preliminary

injunction standard found in the Rules of Civil Procedure. Division's Brief at 4-5. UEI, while not conceding that Rule 65A applies, argues that SUWA fails to meet either standard. UEI's Brief at 8-9.

The Board concludes that the standard for temporary relief under the Coal Act and implementing regulations controls. See *Virginia Surface Min. & Reclam. Ass'n, Inc. v. Andrus*, 604 F.2d 312, 315-16 (4th Cir. 1979) (holding in SMCRA case that SMCRA temporary relief provisions identical to those found in the Coal Act control rather than the general test for injunctive relief applicable in the private civil litigation context). Because the Coal Act test controls, SUWA must meet the Coal Act requirement of demonstrating a "substantial likelihood" of prevailing on its claims, and may not rely on Rule 65A's alternative showing that the claims "present serious issues on the merits."² While the Coal Act/coal rules also differ from Rule 65A in not referencing an analysis of threatened harms as part of the test, they do grant the Board wide discretion to consider other factors the Board views as bearing on the appropriateness of injunctive relief beyond the "substantial likelihood" showing. See Utah Code Ann. §40-10-14(4) (providing that the Board "*may*, under conditions it prescribes, grant temporary relief *it deems appropriate* pending final determination of the proceedings if" a substantial likelihood of prevailing on the merits is shown). The harms threatened by the activity sought to be enjoined

¹ Utah Code Ann. §40-10-1 et seq.

² In the present case, as in *Virginia Surface Mining*, the applicable statute (the Coal Act) sets forth and treats as mandatory a showing of "substantial likelihood of success" on the merits. The Board concludes, as did the court in *Virginia Surface Mining*, that it would be error to relieve the moving party of the burden of making this showing where the Coal Act articulates no alternative lesser standard (as does Rule 65A), and where Rule 65A was not intended to "supplant the criteria for interlocutory relief that have been prescribed by" the legislature. *Virginia Surface Mining*, 604 F.2d at 315. See also *State Tax Comm'n v. Iverson*, 782 P.2d 519, 528 (Utah 1989) (noting Utah Rules of Civil Procedure are not generally applicable to administrative bodies unless (as is not the case here) the applicable statute dictates otherwise).

and by the injunction itself are central factors in traditional injunctive relief analysis, and it would rarely be “appropriate” to grant injunctive relief where there was no harm threatened whatsoever, or where an injunction would do more harm than good. The Board therefore finds it appropriate in this matter, in the exercise of its discretion under Utah Code Ann. §40-10-14(4), to consider as part of its analysis the nature and balance of harms which might result from granting or not granting the requested relief.

With respect to the “substantial likelihood” showing, the parties disagree about how this inquiry is to be made. UEI argues that all parties may present evidence bearing upon the “substantial likelihood” question. SUWA argues that the requirement is met if SUWA’s evidence alone, unrebutted by any conflicting evidence, could support a finding in its favor, and contends it is improper for the Board to consider how any contrary evidence adduced by other parties might affect the “substantial likelihood” question. SUWA’s Reply Brief at 4-5. In support of this proposition, SUWA cites *Water & Energy Sys. Tech., Inc. v. Keil*, 974 P.2d 821 (Utah 1999), in which the Utah Supreme Court discussed the “substantial likelihood” requirement in terms of the moving party making a “prima facie showing.” *Id.* at 822. SUWA then cites *Searle v. Milburn Irrig. Company*, 133 P.3d 382, 395 (Utah 2006) and *Godesky v. Provo City Corp.*, 690 P.2d 541, 547 (Utah 1984) for the proposition that “prima facie evidence” means evidence which, if unrebutted, could support a finding in favor of the moving party. SUWA’s Reply Brief at 5. The Board, however, does not read *Keil* to hold that the Board should consider only SUWA’s evidence, while ignoring evidence adduced by other parties, in analyzing whether there is a “substantial likelihood” of SUWA’s prevailing on the merits. This is true for several reasons.

First, *Keil* held that “an applicant must, *at the very least*, make a prima facie showing” in seeking an injunction. *Keil*, 974 P.2d at 822 (emphasis added). While it is clear from *Keil* that the failure of a moving party’s evidence to meet this minimum standard is fatal, it is not clear that such a showing alone will always suffice, or that it is improper for a court to consider evidence offered by opposing parties. Second, *Keil* discussed the idea of a “prima facie showing” in the context of *Rule 65A*, which permits a party to avoid the “substantial likelihood” standard by instead making a less stringent alternative showing that the claims present “serious issues” which should be the subject of further litigation. As discussed above, the Coal Act test does not include this alternative, and it is unclear to what degree *Keil*’s discussion of a “prima facie showing” was based on this differing standard under *Rule 65A*. Third, the *Searle* and *Godesky* cases cited by SUWA in urging that a “prima facie showing” analysis focuses solely on the moving party’s evidence were not temporary/injunctive relief cases.³ *Keil*, by contrast, did involve injunctive relief, and it is noteworthy that the *Keil* Court, in carrying out its substantial likelihood/prima facie showing analysis, in fact reviewed the evidence adduced by *both sides*, and not merely the evidence offered by the moving party. See *Keil*, 974 P.2d at 823 (setting forth detailed discussion of evidence offered by both moving party and by opposing party as it pertained to whether moving party had demonstrated a substantial likelihood of success in support of motion for injunctive relief). See also *Utah Medical Prod., Inc. v. Searcy*, 958 P.2d

³ *Searle* examined the showing necessary under a water right change application and *Godesky* considered whether compliance with safety codes constituted prima facie evidence of proper electrical installations. The difference in the context in which these cases discuss the notion of a “prima facie” showing is important because, as *Searle* recognized, “‘prima facie evidence’ is an ambiguous phrase” which may have different meanings in different contexts. *Searle*, 133 P.3d at 395 (quoting Edward L. Kimball & Ronald N. Boyce, *Utah Evidence Law* 3-8 (1996)). As discussed more fully above, the Board does not believe the *Keil* Court used the phrase “prima facie showing” in such a way as to suggest that a court or tribunal must ignore evidence offered

228, 232-33 (Utah 1998) (same). The Utah Supreme Court therefore does not appear to apply the phrase “prima facie evidence” in an injunctive relief context in a way which requires a trial court to ignore an opposing party’s evidence and instead focus solely on the evidence of the moving party alone.⁴ While the Board agrees that the “substantial likelihood” test does not require that SUWA prove its case by a preponderance of all of the evidence at this stage, it does not agree that it is compelled to turn a blind eye toward an opposing party’s evidence in examining the “substantial likelihood” question.

Federal cases applying the SMCRA “substantial likelihood” standard (which is identical to the Coal Act standard at issue here) have similarly not limited their analysis solely to the moving party’s evidence, but have considered evidence offered by the party opposing temporary relief as well. *See Patrick Coal Corp. v. Office of Surface Mining*, 661 F.Supp. 380, 385 (W.D. Va. 1987) (considering evidence offered by moving party in light of conflicting evidence offered by opposing party in deciding “substantial likelihood” question); *Harman Mining Corp. v. Office of Surface Mining*, 659 F.Supp. 806, 812 (W.D. Va. 1987) (same).

In light of the above, and in the exercise of its discretion under Section 40-10-14(4) to determine whether temporary relief is appropriate, the Board will consider the evidence and arguments of SUWA as well as the evidence and arguments of the Division and UEI⁵ in deciding

by a party opposing injunctive relief.

⁴ *See also System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983) (recognizing that a court, in granting injunctive relief, must take into “account all the facts and circumstances of the case”).

⁵ Even if the governing standard precluded the Board from considering any evidence adduced by the nonmoving parties, the Board would still have considered some of the testimony offered by the Division in this case and its ultimate decision would have been the same. This is true because the dispute (and the “substantial likelihood” question) turn in large part not upon disputed facts, but upon disagreements concerning how the Division is to interpret and apply the coal rules. *See* footnote 9, below. The testimony of the Division’s witness Mary Ann Wright on

whether the “substantial likelihood” test is met.⁶

II. APPLICATION OF TEST TO FACTS OF PRESENT CASE

As a general matter, injunctive relief is an extraordinary remedy not to be granted lightly. *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983). *See also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (noting injunctive relief is an extraordinary remedy not to be granted “unless the movant's right to relief is ‘clear and unequivocal’”). For the reasons discussed below, the Board holds that SUWA has failed to meet its burden in seeking temporary relief.

A. SUWA Has Not Demonstrated A Substantial Likelihood of Prevailing On Its Claims.

In order to obtain temporary relief, SUWA must demonstrate that “there is a substantial likelihood that [it] will prevail on the merits” of its underlying claims. Utah Administrative Code R645-300-212.220 (2007). In the present case, the underlying claims involve, among other things, allegations that the hydrological information relied upon by the Division was inadequate, and that the Division erred in failing to include the Coal Haul Road in the permit area. Request for Agency Action at 9-21. The information relied upon by the Division, and the Division’s analysis of such information, is set forth in the Permit Application Package (“PAP”),⁷ the

this point was not so much rebuttal evidence bearing upon any disputed factual question as it was an explanation of the Division’s position on the proper application of the coal rules. The Board believes that consideration of such explanatory testimony would be proper regardless of whether the Board is to consider opposing “evidence” in its “substantial likelihood” analysis.

⁶ Because there is no dispute that the requirements of Utah Administrative Code R645-300-212.210 and 230 are met, *see* Division’s Brief at 4, n.1; SUWA’s Reply Brief at 4, the Board’s analysis will focus only on the “substantial likelihood” requirement set forth in Utah Administrative Code R645-300-212.220 as well as the factors pertaining to the nature and balance of harms as discussed above.

⁷ The term “Permit Application Package” or “PAP” is used herein in the same way it was used by the parties in their briefs—to describe the materials submitted to the Division by UEI. The

Division's Technical Analysis ("TA"), the Division's Cumulative Hydrological Impact Analysis ("CHIA") and other permit-related documents.

Because SUWA's present motion focuses on two categories of activity (pertaining to road construction and mine facilities construction) which involve somewhat different issues as they pertain to the "substantial likelihood" test, they are discussed separately below.

1. The Road Construction Activities.

SUWA asks the Board to stay all construction activities related to the Coal Haul Road. SUWA's Motion at 2. In response, the Division and UEI make two arguments. First, they argue that the Board lacks jurisdiction over the Bureau of Land Management ("BLM") which granted the road right of way, and over Emery County which holds the right-of-way and will actually build the road. Division's Brief at 1-4; UEI's Brief at 7-8. The Board agrees that its jurisdiction does not extend to these parties and that it therefore may not issue an order staying road building activities.

Second, the Division and UEI note that the Coal Haul Road is not included within the area covered by the permit under review. Division's Brief at 2-4; UEI's Brief at 5, 7-8. In response to SUWA's claim that the road should have been included within the permit area, the Division and UEI note that such claim was made by SUWA and rejected by this Board in 2001. *See Findings of Fact, Conclusions of Law and Order issued in Docket No. 2001-027; Cause No. C/007?013-SR98(1) on December 14, 2001 at 19.* SUWA alleges in the present case that the facts surrounding the road issue have changed since 2001, and that a different result is therefore warranted. SUWA's Request for Agency Action at 18. The Division and UEI assert that the

term is not used to describe the set materials transmitted to OSM by DOGM, which may be a more accurate use of the term.

facts are unchanged and recently moved this Board to dismiss SUWA's claims concerning the road on *res judicata* grounds. Although the Board denied that motion to dismiss (because the Board was presented with, and did not exclude, matters outside of the pleadings), the Board noted that the facts surrounding the road appeared not to have changed since 2001, and stated that SUWA's claims might be dismissed on summary judgment following the close of discovery if SUWA could produce no evidence of materially changed facts. *See* Order on UEI's Motion to Dismiss SUWA's Claims Regarding the Emery County Road Accessing Lila Canyon Mine at 3-6. The Board noted that the facts surrounding the road were presumptively the same today as in 2001, and that SUWA bore the burden of demonstrating otherwise. *Id.* at 5, n.5. Because SUWA adduced no evidence of materially changed facts concerning the Coal Haul Road at the hearing on its motion for a stay, SUWA has not demonstrated any likelihood of prevailing on its road-related claims.

Because the Board lacks jurisdiction over Emery County as discussed above, and because SUWA has failed to demonstrate a likelihood of prevailing on the merits of its road-related claims, the Board must deny the requested temporary relief as it pertains to road construction activities.

2. The Mine Facility Construction Activities.

While the requested stay of road building activities fails for reasons specific to that issue as discussed above, SUWA's request for a stay of the remaining mining activities fails because SUWA has not demonstrated a likelihood of prevailing on its underlying claims. At the October 24, 2007 hearing, SUWA offered the testimony of Elliot Lips, an expert in geology and

hydrology, in support of its motion.⁸ While the Board recognized Mr. Lips as having certain expertise in the area of hydrology given his work experience, the Board also noted it would bear in mind certain limitations concerning Mr. Lips' expertise which were explored during voir dire (such as Mr. Lips' educational background being in geology rather than hydrology).

Mr. Lips set forth his understanding of the requirements for baseline hydrological information as stated in the coal rules and opined that the information submitted by UEI in the PAP was insufficient to meet those requirements. Mr. Lips stated his opinions concerning the kinds of data collection necessary to meet the coal rules' requirements regarding establishment of surface water quantity and quality (including seasonal variations in flow rates), ground water quantity and quality, and the identification and mapping of seeps and springs. As to each of these areas Mr. Lips opined that the Division, in applying the coal rules, settled for too little information in connection with the permit application.

The Board agrees with the Division that SUWA's criticisms turn as much upon how the coal rules should be applied as they do upon any disputed hydrological facts which Mr. Lips' testimony might shed light on.⁹ The board found Mr. Lips' testimony useful to the extent it

⁸ Although SUWA raised concerns in its original Request for Agency Action regarding cultural resource issues and biological (plant and animal) survey requirements, hydrology issues were the primary focus of its presentation at the hearing. UEI's assertion at the hearing that SUWA had dropped its challenges concerning cultural issues was not disputed by SUWA. With respect to biological survey issues, although SUWA set forth some argument in its Reply Brief on this issue, it adduced no evidence at the hearing on this point. Finally, in its Request for Agency Action and Reply Brief, SUWA asserted the Division erred in processing the subject permit as a significant revision of an existing permit rather than as a new permit. The Division put on testimony at the hearing to the effect that it had in fact applied the requirements for a new permit in processing the application, and such testimony was not challenged.

⁹ SUWA's specific contentions concerning alleged deficiencies in the hydrological information relied upon by the Division are set forth primarily in SUWA's Reply Brief. That brief, and the argument and testimony given at the hearing, demonstrate that much of the dispute centers on disagreements over how the coal rules are to be understood and applied. The deficiencies

focused on hydrology, but of little aid where it characterized what the coal rules require or stated conclusions concerning whether UEI's submissions were sufficient for purposes of those rules.¹⁰

As to these latter topics, the Board found the testimony adduced by the Division concerning its understanding and application of the rules as reflected in the TA and CHIA at least as helpful as the testimony of SUWA's hydrologist Mr. Lips in assessing SUWA's likelihood of prevailing upon the merits.

The primary weakness in Mr. Lips' testimony, however, is that while he referred repeatedly to UEI's PAP and whether in his opinion its contents were sufficient to meet the requirements of the coal rules, he did not refer to the Division's analysis of this same question as set forth in the TA and CHIA. SUWA's presentation in general did not address the TA and CHIA, which after all are the central documents explaining and memorializing the Division's

alleged in SUWA's Reply Brief reflect an understanding which differs from that of the Division concerning what kind of information gathering will suffice to satisfy the coal rules' demand for information regarding baseline water quality and quantity, concerning the meaning of the term "aquifer" as used in the rules, and concerning whether subsidence is considered a surface disturbing activity for permitting purposes. See SUWA's Reply Brief at ¶¶1-10.

¹⁰ In addition to citing the coal rules in support of its arguments concerning the quality and quantity of information the Division should have required of UEI, SUWA also cites statements made by Division staff during the Division's review process in arguing that the Division ultimately accepted less information than it should have. SUWA highlights statements in correspondence in which Division employees expressed concerns, questioned the sufficiency of certain submittals, and made other statements evidencing that they were thinking critically about the issues associated with the permit application. SUWA appears to suggest that the Division had at one stage concluded that a certain standard must be met and then later failed to hold UEI to such standard. Whether the information submitted by UEI was sufficient for purposes of the coal rules is governed by the coal rules themselves, however, and not by comments made by Division staff during the permit review process. Furthermore, the fact that the Division made broad requests for information, and engaged in some argument with UEI during the permit process concerning UEI's application, does not evidence that the Division erred when, at the end of that process, it finally concluded that the permit should be issued based on the totality of the submissions. Healthy ongoing discussions concerning the sufficiency of an applicant's submissions during the permit process strengthen that process and should not be seen as weakening the Division's final decision.

action under review. SUWA neglected to address the TA despite the fact that it specifically addresses some of the concerns now raised by SUWA as a result of SUWA's having raised those concerns during the Division's permit review process.¹¹ Where SUWA primarily offered its own analysis of UEI's submissions, but did not effectively address the Division's analysis of those submissions, or address why that analysis does not answer SUWA's concerns,¹² the Board does not believe that SUWA has demonstrated a likelihood of prevailing on the merits of its claims.

Ultimately, because the parties' dispute turns in large part upon what a proper application of the coal rules requires, because SUWA addressed that question primarily through an expert witness with no particular expertise in that area, and because SUWA's presentation did not sufficiently address the Division's analysis of this question as set forth in the TA, CHIA and other documents memorializing the decision under review, the Board is not persuaded that SUWA has demonstrated a likelihood of succeeding on the merits of its claims.

B. The Nature and Balance of the Threatened Harms Does Not Support a Stay.

As discussed more fully above, in addition to SUWA making the "substantial likelihood" showing required under the statute and rules, in order for temporary relief to be granted, this Board must be satisfied that such relief is "appropriate." See Utah Code Ann. §40-10-14(4).

¹¹ SUWA participated in informal conferences with the Division during the permit review process and raised some of the same concerns it raises now, prompting the Division to address those concerns in its final TA. Despite the fact that the Division's responsive analysis forms a part of the decision documents under review, SUWA did not effectively address those documents and that analysis in moving for a stay.

¹² A reflection of this problem can be seen in Mr. Lips' testimony concerning the work done by the Division's hydrologists in processing the UEI permit. Mr. Lips acknowledged that the Division's hydrologists are capable hydrologists with more experience than Mr. Lips in applying the coal rules to hydrology issues, and that they rejected the criticisms and alleged deficiencies raised by Mr. Lips. Despite this admission, and despite the fact that the Division addressed some of SUWA's concerns in the TA and CHIA, Mr. Lips and SUWA in general did not refer to or

The Board does not believe it would be appropriate to grant temporary injunctive relief if there were no threatened harm warranting a stay, or if a stay would do more harm than good. The Board therefore finds it appropriate, in the exercise of the discretion granted it by Section 40-10-14, to make inquiry into the nature and balance of the threatened harms in making its decision.

SUWA argues it will suffer irreparable harm if road and surface facility activities are not stayed. SUWA's Lead Brief at 5. SUWA cites the BLM Environmental Assessment: Development of the Lila Canyon Project Emery County, Utah, EA No. UT-070-99-22 (excerpts attached to SUWA's Lead Brief as Exhibit E and to UEI's Brief as Exhibit B) (the "EA") as evidence that vegetation and soils within the subject area of Lila Canyon will be impacted by the planned development. *Id.* at 6-7. As noted by UEI, however, on October 27, 2000, the BLM issued a decision record/finding of no significant impact ("DR/FONSI") determining that the proposed actions discussed in the EA (pertaining to both the road and the mine surface facilities) would result in no significant environmental impact. *See* UEI Brief at 4 and exhibits cited therein (including DR/FONSI at 7-8). The BLM's finding was based in part on required measures designed to mitigate potential impacts to soils, hydrology, vegetation and other resources. DR/FONSI at 2-4 and 8. The BLM found that where such impacts were not totally mitigated, they were "not major in scope and would be of short duration." *Id.* at 8. SUWA unsuccessfully appealed the BLM's DR/FONSI to the Interior Board of Land Appeals ("IBLA") and did not appeal the IBLA decision. *See* UEI Brief at 4 and exhibits cited therein. Given the BLM's DR/FONSI, the Board does not view the BLM EA itself as evidence of impacts sufficient to demonstrate irreparable harm.

Aside from its citation to the BLM EA in its brief, SUWA at the October 24, 2007

address the TA and CHIA or the Division's analysis set forth therein.

hearing offered little else in support of its contention of irreparable harm. Mr. Lips' testimony, as discussed above, focused primarily upon what he perceived to be shortcomings in the data gathered in support of the permit, rather than upon a detailed discussion of any adverse hydrological consequences which might result. SUWA elicited testimony from UEI indicating that the areas which will be affected by their development plans are generally "undisturbed" at the present time, but presented little argument or evidence concerning what precisely the threatened impacts will be and why such impacts are irreparable and would not be mitigated by required reclamation following mining activities.

As to the balance of harms, SUWA argues that UEI's actions during the permitting process demonstrate it is in no hurry to commence mining operations, and that the balance of harms favors granting a stay to protect threatened resources during the pendency of this matter. SUWA's Lead Brief at 8. UEI argues that SUWA through its appeals, rather than UEI, has been the primary cause of delays associated with permit issuance. UEI Brief at 13. UEI also argued and adduced testimony indicating that the granting of a stay will cause it economic injury associated with delays in development and will adversely impact local communities which would benefit from the creation of new jobs associated with the proposed mine (which jobs, UEI argued, will help counter the impact of the recent shutdown of the Crandall Canyon Mine and the Tower Mine in August of 2007). Given SUWA's failure to adequately demonstrate irreparable harm as discussed above, and given the negative effects on UEI and the communities which might fill jobs associated with the mine, the Board cannot say that the balance of harms weighs in favor of a stay.

III. CONCLUSION.

Because the Board does not find that SUWA has demonstrated a substantial likelihood of prevailing on its claims, the Board denies SUWA's Motion for Stay of Mining Activity. The Board additionally finds that the nature and balance of threatened harms in this case do not make the requested temporary relief appropriate, and denies SUWA's Motion for Stay of Mining Activity on that basis as well.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

ENTERED this 21st day of December, 2007.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING


Robert J. Bayer, Acting Chairman

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing ORDER for Cause No. C/007/013-LCE07 to be mailed with postage prepaid, this 3rd day of January, 2008, to the following:

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